



Issue Date: 28 October 2016

BALCA Case No.: 2013-PER-02141
ETA Case No.: A-12177-75521

In the Matter of:

ADVENT GLOBAL SOLUTIONS,
Employer,

on behalf of

CHIMOTE, SAMEER YADAVRAO,
Alien.

Certifying Officer: William L. Carlson, Ph.D.
National Certifying Officer

Appearance: Naresh Gehi, Esquire
Law Offices of N.M. Gehi, P.C.
Forest Hills, New York
For the Employer

Before: Stephen R. Henley, *Chief Administrative Law Judge*; Paul R. Almanza and
Morris D. Davis, *Administrative Law Judges*

DECISION AND ORDER
DIRECTING GRANT OF CERTIFICATION

PER CURIAM. This matter arises under § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) and the “PERM” labor certification regulations at 20 C.F.R. Part 656.¹

BACKGROUND

The Employer filed an *Application for Permanent Employment Certification* (“Form 9089”) sponsoring the Alien for permanent employment in the United States in Houston, Texas.

¹ “PERM” is an acronym for the “Program Electronic Review Management” system established by the regulations that went into effect on March 28, 2005.

The occupational title listed on the Form 9089, Section F.3, was “Senior Programmer/Analyst,” Standard Occupational Classification Code 11-3021.00. (AF 103-115).² The Employer attested on the Form 9089 that the available job opportunity was in a professional occupation and that four types of professional recruitment were conducted: the Employer’s website advertisement, a job search website advertisement, use of an employee referral program, and a trade or professional organization advertisement. (AF 106-107).

On August 28, 2012, the CO issued an audit notification to the Employer requesting, among other items, recruitment documentation as outlined in § 656.17(e). (AF 98-102). On September 27, 2012, the Employer submitted its audit response, including documentation of each of its four professional recruitment steps. (AF 61-74). After reviewing the Employer’s audit response, the CO denied certification because the Employer “failed to provide dated copies of pages of newsletters or trade journals (IEEE Computer Society Magazine) containing advertisements for the occupation involved in the application...,” citing a violation of § 656.17(e)(1)(ii)(E). (AF 22-24).

On May 14, 2013, the Employer requested reconsideration and submitted the “original magazine” tearsheets, arguing that the original pages “evidence[] beyond a reasonable doubt that the advertisement came out in the May 2012 issue of the magazine.” (AF 3). The Employer also resubmitted the documentation of all of its additional recruitment steps.³

The CO reconsidered, but determined the denial ground was valid because the Employer “failed to provide adequate documentation of the additional recruitment step[.]...” (AF 1-2). The CO also declined to consider the magazine tearsheets submitted with the request for reconsideration pursuant to 20 C.F.R. § 656.24(g)(2)(i)-(ii) because the Employer had the opportunity to submit the documentation with the audit response. (AF 1-2).

The CO forwarded the case to the Board of Alien Labor Certification Appeals (“BALCA”). BALCA issued a Notice of Docketing on February 11, 2014. The Employer submitted an appellate brief,⁴ arguing that the CO’s denial was “arbitrary and capricious,” in violation of the Administrative Procedure Act at 5 U.S.C. § 706(a)(2). (Emp. Brf. at 4). The Employer also argued that even if its documentation of its trade journal advertisement were insufficient, its application qualified for certification because it conducted four types of additional recruitment, but only three were required. *Id.* at 5.

The CO did not file a statement of position or an appellate brief.

DISCUSSION

When an employer files an application for permanent labor certification under the basic process at 20 C.F.R. § 656.17, the employer must attest to having conducted specific recruitment steps. 20 C.F.R. § 656.17(e). When certification is sought for a professional occupation, an

² Citations to the Appeal File are abbreviated as “AF” followed by the page number.

³ The documentation included with the request for reconsideration duplicated the documentation submitted with the Employer’s audit response. (AF 8-20).

⁴ The Employer’s brief was received on June 20, 2013, prior to the issuance of the Notice of Docketing.

employer must conduct “mandatory steps,” including a job order and two print advertisements, as well as *three* of ten additional recruitment steps. 20 C.F.R. § 656.17(e)(1)(i)-(ii).

In *Enerdel, Inc.*, 2010-PER-01060 (Dec. 12, 2011), an employer attested on its application that it conducted four additional recruitment steps. The sole ground for denial was that the employer’s documentation of its website advertisement was not sufficient. *Id.* The panel reversed the denial of certification, finding that the employer “conducted four additional recruitment steps..., listed four additional recruitment steps on its ETA Form 9089, and submitted documentation of all four recruitment steps with its audit response materials.”⁵ *Id.* Because only three additional recruitment steps were necessary to comply with the regulations, and the CO did not find a deficiency in the other three recruitment steps, the panel determined that the CO improperly denied certification. *Id.*

In this case, the Employer attested on the Form 9089 that it conducted *four* additional recruitment steps. In its audit response, the Employer included documentation of its website advertisement, a job search website advertisement, its employee referral program, and a trade journal advertisement. The CO denied certification solely because the Employer’s documentation of its trade journal advertisement was insufficient. Because the CO did not cite any deficiencies in the Employer’s remaining three professional recruitment steps, we find that the Employer complied with § 656.17(e)(1)(ii) by submitting proper documentation of three additional recruitment steps. Because the CO could not deny the application based solely on insufficient documentation of a *fourth* additional recruitment step, the CO improperly denied certification.⁶

⁵ In *Enerdel*, the panel concluded that the the employer’s website documentation was not sufficient because it did not list a geographic location, in violation of 20 C.F.R. § 656.17(f)(4). In *Symantec, Corp.*, 2011-PER-01856 (July 30, 2014) (*en banc*), the Board effectively overturned that aspect of the case. We cite *Enerdel* only for its findings based on the employer’s attestation to and submission of documentation of four, rather than three, additional recruitment steps.

⁶ Because we reverse the denial of certification based on the Employer’s compliance with § 656.17(e)(1)(ii), we do not reach the issue of whether the Employer’s documentation of its trade journal advertisement violated § 656.17(e)(1)(ii)(E).

ORDER

IT IS ORDERED that the denial of labor certification in this matter is **REVERSED** and that this matter is **REMANDED** for certification pursuant to 20 C.F.R. § 656.27(c)(2).

Entered at the direction of the panel by:

Todd R. Smyth
Secretary to the Board of Alien Labor
Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for en banc review by the Board. Such review is not favored and ordinarily will not be granted except (1) when en banc consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW Suite 400
Washington, DC 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting en banc review with supporting authority, if any, and shall not exceed ten double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed ten double-spaced pages. Upon the granting of a petition the Board may order briefs.